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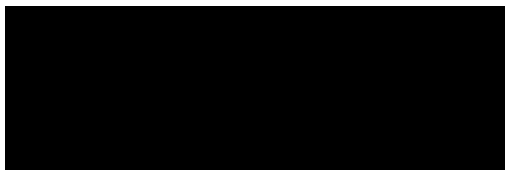
U.S. Department of Homeland Security
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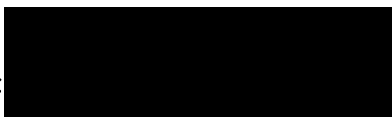
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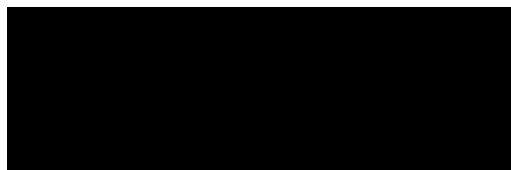
FILE: WAC 02 133 51776 Office: CALIFORNIA SERVICE CENTER Date: **MAR 22 2004**

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3) as a skilled worker. The petitioner is a dry cleaners/alterations business. It seeks to employ the beneficiary permanently in the United States as an alterations tailor. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel asserts that the director misinterpreted the petitioner's financial information and that the petitioner's evidence established its ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g) provides in pertinent part:

(2) *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests upon whether the petitioner's ability to pay the wage offered has been established as of the petition's priority date. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is August 12, 1996. The beneficiary's salary as stated on the labor certification is \$9.50 per hour or \$19,760 per year based on a 40-hour week. The visa petition indicates that the petitioner was established in 1990 and is organized as a sole proprietorship

The petitioner initially submitted evidence of its ability to pay the proffered wage consisting of copies of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for the years 1996 through 2000. They reflect that he filed jointly with his spouse and claimed two dependents in 1996, one dependent in 1997 and no dependents in the remaining years. These tax returns also contain the following information:

Year	Business Income (Schedule C)	Adjusted Gross Income
1996	\$46,157	\$41,974
1997	44,743	40,493
1998	40,742	36,580

Year	Business Income (Schedule C)	Adjusted Gross Income
1999	39,333	33,857
2000	31,787	26,844

On May 15, 2002, the director requested additional evidence from the petitioner supporting its ability to pay the beneficiary's wage offer of \$19,760 per annum. The director advised the petitioner to submit signed federal tax returns, annual reports, or audited financial statements and specifically requested federal tax returns for the years 1996 through 2001. The director also requested copies of the petitioner's state quarterly wage reports for the most recent four quarters filed, as well as a summary of the sole proprietor's reasonable monthly living expenses.

In response, the petitioner, through counsel, resubmitted the requested federal tax returns including the sole proprietor's individual tax return for 2001. It shows that the sole proprietor's business income was \$30,267 and his declared adjusted gross income was \$25,728. The state quarterly wage reports disclose that the petitioner employed four to five employees during the period from September 2001 through June 2002. Counsel's cover letter dated August 2, 2002, which was submitted with the petitioner's response, states that the petitioner's living expenses are approximately \$2,055 per month. Counsel also claims that some of the money to be paid to the beneficiary would come from current employees' salaries and from new business. None of counsel's statements are supported by any convincing first-hand evidence from the petitioner. Counsel's assertions do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988).

In denying the petition, the director noted that although the sole proprietor's gross income of approximately \$40,000 in 1996 and 1997 may have covered the beneficiary's wage offer of \$19,760 in each year, it was unclear that the sole proprietor's 1998 and 1999 adjusted gross income(s) of \$36,580 and \$33,857, respectively, was enough to meet the beneficiary's proffered wage as well as pay the sole proprietor's monthly living expenses. The director also found that the sole proprietor's adjusted gross income(s) of \$26,844 in 2000 and \$25,728 in 2001 could not reasonably be expected to provide sufficient funds to cover the proffered wage of \$19,760 as well as pay for the living expenses of the owner and his family in either year.

On appeal, counsel asserts that the director should have limited his review to the petitioner's profit and not the sole proprietor's income. The AAO cannot agree. The profit or loss of the petitioning business represents only a portion of the determination of the petitioner's ability to pay the proffered wage. A sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income and personal expenses and liabilities are relevant to the petitioner's ability to pay the proffered wage. Sole proprietors report income and expenses from their businesses in their individual Form 1040 federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. A sole proprietor must show that he or she can cover their existing business expenses and pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents.

The AAO does not dispute the director's analysis of the sole proprietor's resources as shown by his tax returns. It is also noted that even without including the sole proprietor's annual living expenses of approximately \$24,000 that counsel suggested was appropriate, the beneficiary's annual wage offer of \$19,760 represents 54% of the sole proprietor's adjusted gross income in 1998; 58% in 1999; 74% in 2000; and 77% in 2001. Although the sole proprietor claimed no dependents during those years, it is very unlikely that the sole proprietor could support himself and his spouse and cover the beneficiary's proffered wage. In *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982) *aff'd*, 703 F. 2d 571 (7th Cir. 1983), the court concluded

that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than 20,000 where the beneficiary's proposed salary was \$6,000 or about 30% of the petitioner's gross income.

On appeal, counsel cites other cases where the AAO reviewed bank account balances and found an ability to pay the proffered wage.¹ While other cash or cash equivalent assets can be considered in examining a sole proprietor's ability to pay a beneficiary's proposed salary, it is noted that the record in the instant case does not contain such evidence.

In the context of the financial records contained in the record, counsel argues that *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is applicable where the expectations of increasing business and profits support the petitioner's ability to pay the proffered wage. *Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner had been in business for over 11 years and was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. No unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa*. The petitioning business' income shows a steady decline from \$46,157 in 1996, to \$30,267 in 2001. The sole proprietor's income also shows a similar decrease from \$41,874 to \$25,728 during the period covered by the federal tax returns.

In view of the foregoing and based on a review of the financial documentation contained in the record, the AAO cannot conclude that the petitioner has demonstrated a continuing financial ability to pay the proffered wage as of the priority date of the visa petition pursuant to the requirements set forth in 8 C.F.R. § 204.5(g)(2).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

¹ The regulation at 8 C.F.R. § 103.3(c) provides that while precedent decisions are binding on all CIS employees, unpublished decisions are not similarly binding.